

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re)	Misc. Dkt. No. 2004-01
Major HARRY M. SCHMIDT, USAF,)	
)	
Petitioner)	
)	
v.)	ORDER
)	
Colonel MARY BOONE, USAF,)	
Military Judge,)	
)	
THE UNITED STATES AIR FORCE, and)	
THE UNITED STATES,)	
Respondents)	Panel No. 2

The petitioner moves for expedited review of his Petition of Extraordinary Relief in the Nature of a Writ of Mandamus. He also asks this Court to order a stay of any and all court-martial proceedings.

On 30 July 2003, the petitioner was arraigned on a charge of dereliction of duty in violation of Article 92, UCMJ, 10 U.S.C. § 892. The government alleged that he willfully failed to exercise appropriate flight discipline over his aircraft and he failed to comply with the rules of engagement and special instructions for airmen during an incident near Kandahar, Afghanistan. As part of the discovery process, the government granted the petitioner's civilian defense counsel access to 12 volumes of the classified Collateral Investigation Board report and all associated evidence. The petitioner's civilian defense counsel requested and was granted access to other classified information. Both parties agree that the government has granted the petitioner's civilian defense counsel access to all of the classified information he has requested.

Two weeks before the petitioner's arraignment, the petitioner's civilian defense counsel made a written request to the convening authority to be processed for a security clearance at the Secret level. On 3 October 2003, the staff judge advocate for the convening authority notified the petitioner's civilian defense counsel that his request for a security clearance was denied. In response, the petitioner's civilian defense counsel filed a motion requesting that the trial judge order the convening authority to process a security clearance for him at the Secret level. The government trial counsel opposed the motion on the grounds that providing access to requested classified information to the petitioner's civilian defense counsel was adequate. After hearing argument on the motion

on 16 and 17 October 2003, the military judge denied the defense motion on 19 December 2003.

On 8 January 2004, the petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus with this Court. The petitioner requested that this Court order the respondents to process the civilian defense counsel's request for a security clearance at the Secret level and to stay the proceedings until it is processed. The petitioner asserts that such action is necessary because his right to effective assistance of counsel is impeded because the petitioner's civilian counsel must identify to government counsel classified information to be reviewed with his client and must seek access to such information through government counsel. On 15 January 2004, this Court ordered the government to produce a transcript of the portions of the trial relevant to the petitioner's Petition for Extraordinary Relief. Additionally, we ordered that upon completion and authentication of the transcript, the counsel on behalf of the United States show cause why the Petition should not be granted. On 22 January 2004, during a Rule for Courts-Martial 802 conference, the military judge scheduled an Article 39a UCMJ, 10 U.S.C. § 839a, session for 1 March 2004, with the trial on the merits commencing on 5 April 2004. On 2 February 2004, the government filed their answer to the order to show cause along with the authenticated transcript of the pretrial proceedings relevant to the motion. Thereafter, both parties filed additional motions supplementing their arguments.

On 24 February 2004, the petitioner filed a motion with this Court for expedited review and for a stay of all court-martial proceedings until this Court renders a decision on his Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. The petitioner asserts that some of the motions that the parties plan to litigate in the 1 March 2004 Article 39a, UCMJ, session "may" involve classified information. He further asserts that because the petitioner's civilian counsel does not have a Secret clearance, the petitioner's ability to fully and adequately discuss classified information in this case with his civilian counsel has been chilled. Finally the petitioner argues that his right to effective assistance of counsel will be prejudiced if the Article 39a, UCMJ, session proceeds as scheduled. The government opposes the stay.

This Court is empowered to issue extraordinary writs. The power is "generally predicated upon the All Writs Act, 28 U.S.C. § 1651(a)." *Dettinger v. United States*, 7 M.J. 216, 218 (C.M.A. 1979). While this power is great, it is not unlimited. Our superior court has stated that a writ of mandamus "is not to 'control the decision of the trial court,' but . . . to confine . . . [it] to the sphere of its discretionary power." *Id.* Additionally, the Court emphasizes that the standards that govern the award of extraordinary relief are different than the standards for appeal from an action or decision in a case. *Id.* at 217. Specifically, the Supreme Court has said:

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. As we have observed, the writ "has traditionally

been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."

Kerr v. United States Dist. Court for N. Dist. of Cal., 426 U.S. 394, 402 (1976) (internal citations omitted). Moreover, "the party seeking mandamus has the burden of showing that its right to issuance the writ is 'clear and indisputable.'" *Lemoine v. Baker*, 36 M.J. 86, 90 (C.M.A. 1992) (summary disposition) (Crawford, J. dissenting). The petitioner must also "show that they lack adequate alternative means to obtain the relief they seek." *Id.* See also *Kerr*, 426 U.S. at 403.

The petitioner has not demonstrated to the satisfaction of this Court that his right to extraordinary relief is "clear and indisputable." The petitioner has not indicated to this Court that he requested a stay from the trial court. Furthermore, in his request for a stay of the court-martial proceedings, the petitioner asserts that some of the motions the defense plans to litigate on 1 March 2004, "may" involve classified information. They have not asserted or shown that the motions will involve classified information. Additionally, even if the anticipated motions involve classified information, the petitioner has not asserted or shown that his civilian defense counsel does not already have access to that classified material. Without such assertions, the petitioner has not convinced this Court that a stay of the Article 39a, UCMJ, session is warranted.

Accordingly, it is by the Court, this 26th day of February 2004;

ORDERED:

That the petitioner's request for a stay of the Article 39a, UCMJ, session scheduled to commence on 1 March 2004 is DENIED.

That petitioner's request for expedited review of his Petition for Extraordinary Relief is GRANTED. The Court will render a decision on the petition expeditiously.

FOR THE COURT
OFFICIAL

HEATHER D. LABE
Clerk of Court